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No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

BRIEF OF RESPONDENT
USA PETROLEUM COMPANY

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QUESTIONS PRESENTED

1. Does the per se condemnation of vertical maximum price-fixing presume anticompetitive effect in the interbrand market such that a competitor's losses constitute antitrust injury?

2. Assuming arguendo that the per se rule presumes anticompetitive effects only in the intrabrand market, must a competitor prove, in order to demonstrate antitrust injury, that the price-fixers:

a. unreasonably restrained trade in the interbrand market under a Sherman Act § 1 rule of reason standard; or

b. had a dangerous probability of successful monopolization in the interbrand market under a Sherman Act § 2 standard?

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COUNTERSTATEMENT OF THE CASE

USA Petroleum Company ("USA"),[1] one of the few remaining independent gasoline marketers in California,[2] buys gasoline from refiners and sells gasoline at retail to consumers. (J.A. 11.)

ARCO is one of the seven major integrated oil companies that produce, refine and market petroleum products in California. ARCO markets branded gasoline at wholesale to independently owned ARCO-brand stations and at retail through company-owned stations. (J.A. 11-14.) USA competes with both types of ARCO-brand stations. (J.A. 15.)

ARCO's Scheme to Eliminate Independents from the Market

The major integrated oil companies dominate the retail gasoline market in California. These large competitors have generally refrained from aggressive price competition. (J.A. 13.) Historically, the independent marketers competed on price, affording consumers gasoline at prices below those of the majors. (J.A. 14.)

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[1] There are no changes to the statement of Respondent's Non-Wholly Owned Subsidiaries and Affiliates that appears as footnote 1 to Respondent's Brief in Opposition to Petition for Certiorari. This brief uses "J.A." to refer to the Joint Appendix and "Dckt NR" to refer to docket numbers on the list of Relevant Docket Entries.

[2] While this brief refers to California for ease of reference, USA also has stations in Washington and Nevada.

Beginning in April 1982, ARCO implemented a scheme to eliminate independents and the price competitive force they represented in the marketplace. (J.A. 17.) ARCO targeted the ARCO-branded dealers who competed directly with USA and other independents, and fixed their retail prices below the market level. ARCO monitored these fixed prices daily and secured dealer compliance through coercive tactics. ARCO threatened to reduce gasoline supply, terminate operating agreements or eliminate price allowances to dealers who refused to charge the fixed price. (J.A. 17-20.) ARCO partially subsidized its dealers' fixed prices through temporary volume allowances, which it funded by manipulating the intercompany transfer price of crude oil between its production and refining departments, and deliberately underpaying federal windfall profit taxes and state taxes. (J.A. 17-18.)[3]

In addition, ARCO restricted the supply of unbranded gasoline available to independents. ARCO reduced the volumes sold to, and price discriminated against, its unbranded purchasers. It also targeted independent refiners, traditionally the major source of supply to independents. (J.A. 14-15, 18-20, 24-26.)

ARCO's scheme accomplished its intended goal. Independents, including USA, could not meet ARCO's fixed retail prices, which were frequently lower than the wholesale prices paid by independents. (J.A. 18, 20.) While many independents were forced to exit the market, USA managed to survive by closing or selling over half of

[3] USA does not challenge price reductions resulting from ARCO's discontinuance of its credit card or any genuine cost reductions. (*See* Brief of Petitioner at 3.)

its gasoline stations and drastically curtailing its retail operations. USA lost substantial sales and profits as a direct result of ARCO's conspiracy. (J.A. 15, 20.)

In driving out the independents, ARCO eliminated the price competitive segment of the industry. As USA's complaint foresaw, the demise of independents led to the stabilization of retail margins in a concentrated gasoline market controlled by the integrated oil companies. (J.A. 20.) Replacing the independents, ARCO catapulted from the fourth-ranked seller in 1981 to the top-ranked seller by the end of 1983. (J.A. 16.)

USA's Lawsuit

On May 27, 1983, USA filed a complaint against ARCO, alleging that its conspiracy to fix below-market prices constituted an unreasonable restraint of trade in violation of Sherman Act § 1, attempted monopolization in violation of Sherman Act § 2, price discrimination under the Robinson-Patman Act and violations of various state laws.[4] (Dckt. NR 1.)

ARCO moved to dismiss the complaint, which the district court denied in part and granted in part. The court held that USA properly alleged resale price maintenance and had standing to pursue its antitrust claims as a retail-level competitor, consumer and target of ARCO's scheme. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F.

[4] These Robinson-Patman Act and state law claims, on which ARCO did not move for dismissal, have been stayed. (Dckt. NR 108.)

Supp. 1296, 1302, 1305 (C.D. Cal. 1983). However, the district court held that § 2 required dangerous probability of successful monopolization and did not reach conduct that, as USA had alleged, left the market controlled by the few major oil companies. Consequently, the court dismissed USA's § 2 claim. *Id.* at 1304.

USA filed a first amended complaint and ARCO again moved to dismiss the § 2 claim based on lack of dangerous probability of successful monopolization. The district court denied this motion. (Dckt. NR 54.) On May 3, 1984, ARCO filed its answer. (J.A. 36.)

ARCO's Motion for a Pretrial Order

On June 9, 1986, ARCO filed a motion for a pretrial order.[5] ARCO conceded, for purposes of its motion, that it committed a per se violation of § 1 by organizing a vertical conspiracy with its dealers to fix below-market prices in order to eliminate independents, including USA, from the market. ARCO moved that the court rule, pursuant to Fed. R. Civ. P. 56(d), that retail gasoline was the relevant product market and that ARCO had no dangerous probability of successfully monopolizing that market. ARCO then asked for dismissal of USA's § 1 claim

[5] ARCO originally moved for partial summary judgment as to USA's Sherman Act §§ 1 and 2 claims on March 31, 1986. USA voluntarily dismissed with prejudice its § 2 claim on April 28, 1986. (J.A. 76.) ARCO then withdrew its original motion and filed a motion for a pretrial order under Fed. R. Civ. P. 16. (Dckt. NR 83 at 6.)

"on the ground that the ruling that there is no likelihood of successful monopolization precludes [USA] from satisfying the 'antitrust injury' requirement." (Dckt. NR 83 at 2.)

Acknowledging that dangerous probability of successful monopolization is not an element of a substantive § 1 offense, ARCO nevertheless argued that the antitrust injury requirement imposes this element on private plaintiffs. ARCO arrived at this conclusion by arguing that vertical maximum price-fixing, in a case brought by a competitor, is the equivalent of single firm predatory pricing under § 2, which requires proof of a dangerous probability of achieving monopoly power.

ARCO introduced evidence only on the question of whether it had a dangerous probability of successful monopolization. ARCO submitted a declaration that its market share in California and Washington did not exceed 17% as of December 1983.[6] (J.A. 69; Dckt. NR 80 at 163, 193.) ARCO also argued that other major oil companies would prevent ARCO from exercising monopoly power.

ARCO did not make any factual showing regarding the marketplace effects of its conspiracy. Contrary to petitioner's brief, ARCO did not attempt to prove that (1) its conspiracy fixed nonpredatory prices (Brief of Petitioner at i, 37, 43); (2) its price-fixing scheme could not

[6] Curiously, ARCO omitted Nevada, where its size and conduct prompted the legislature to pass a statute that forced ARCO to divest itself of company-owned retail stations. Nev. Rev. Stat. Ann. § 598.677 (Michie 1987).

create a market structure in which ARCO could charge supracompetitive prices (*id.* at 6, 12, 43); or (3) the fixed prices charged by its dealers resulted from a pass-through of ARCO's price subsidies (*id.* at 33). ARCO instead relied on a purely legal argument that the mere absence of threatened monopolization required dismissal of USA's § 1 claim.

USA opposed ARCO's motion on the ground that ARCO's antitrust injury argument represented an improper, back door attempt to redefine the substantive antitrust law. In requiring USA to show predatory pricing and dangerous probability of successful monopolization, ARCO was complaining not about the relationship between USA's injury and the conspiracy's anticompetitive effects but about the substantive judgment that its price-fixing is anticompetitive. Recasting its argument in antitrust injury terms, ARCO sought to end-run per se condemnation of its price-fixing.

The district court granted ARCO partial judgment on USA's § 1 claim. (Pet. App. B.) The court assumed that USA could prove resale price maintenance violative of § 1 but found that such price-fixing could not cause antitrust injury unless it also constituted predatory pricing. The court held, as a matter of law, that the predatory pricing offense requires dangerous probability of successful monopolization.[7] (*Id.* ¶ 5.) Although it made no finding

[7] The district court's finding that ARCO did not have a dangerous probability of successful monopolization is

(Continued on following page)

as to the relevant geographic market, the court determined that the other major oil companies "effectively prevent [ARCO] . . . from exercising monopoly power in that market regardless of their market share." (*Id.* ¶ 4.) Contrary to ARCO's assertion, the court did not make any findings (or receive any evidence) as to the actual marketplace effects of ARCO's conduct.[8] (Brief of Petitioner at 12, 43-44.)

The district court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed. R. Civ. P. 54(b). USA appealed the decision to the Ninth Circuit.

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erroneous. Absent a finding as to the relevant geographic market, which the court did not make and on which ARCO presented no evidence, the fact that ARCO accounted for 17% of total gallons sold in California and Washington says nothing about ARCO's market power. The scope of the geographic market is the area in which purchasers can practicably turn for substitutes. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The retail gasoline market is necessarily local. Drivers in Los Angeles will not go to San Francisco, let alone Seattle, to buy gas. *California v. American Stores Co.*, 697 F. Supp. 1125, 1129-30 (C.D. Cal. 1988), *aff'd in part, rev'd in part*, 872 F.2d 837 (9th Cir. 1989). Thus, the relevant inquiry is whether ARCO has market power in the relevant market areas, wherever they may be, and not the western states as a whole.

[8] In fact, USA filed an affidavit pursuant to Fed. R. Civ. P. 56(f) informing the court that the anticompetitive effects of ARCO's conspiracy and the relevant market could be determined only after deposition, expert and document discovery was completed. (J.A. 84-85.)

The Ninth Circuit's Decision

The Ninth Circuit reversed the district court's grant of partial judgment. *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687 (9th Cir. 1988). The majority held that ARCO's price-fixing conspiracy, which was uncontested for purposes of appeal, could cause USA antitrust injury. The court rejected ARCO's contention that the elements of predatory pricing under § 2, *viz.*, dangerous probability of successful monopolization, can be engrafted onto a § 1 offense under the guise of antitrust injury.[9]

ARCO filed a petition for rehearing and suggestion for rehearing en banc. No judge requested a vote on the suggestion for rehearing en banc. On January 10, 1989, the Ninth Circuit denied ARCO's petition. (Pet. App. C.)

SUMMARY OF ARGUMENT

ARCO organized a conspiracy with its dealers to fix below-market gasoline prices. The purpose and effect of the conspiracy was to drive out the independent marketers, the only significant source of price competition in an already concentrated industry. This conduct is per se unlawful under § 1. The losses of USA, an independent, flow from this patently anticompetitive conspiracy and constitute antitrust injury.

[9] The dissent concluded that antitrust injury requires proof of a § 2 predatory pricing offense. *USA*, 859 F.2d at 701 (Alarcon, J., dissenting).

ARCO claims that USA, the direct target of its admitted conspiracy, has not suffered antitrust injury because per se condemnation of vertical maximum price-fixing extends only to intrabrand competition. ARCO argues that, as against an interbrand competitor, its price-fixing should be viewed as the equivalent of single firm pricing governed by § 2. Therefore, ARCO concludes, to demonstrate antitrust injury USA must prove that ARCO threatens monopolization.

This Court's recent opinions expressly held that vertical price-fixing is per se unlawful under § 1 precisely because of its potential for adverse effects on interbrand competition. As a horizontal competitor, therefore, USA suffers damages that reflect the precise anticompetitive interbrand effects presumed to flow from vertical price restraints. Furthermore, even without the benefit of the per se rule, USA could demonstrate under the rule of reason that ARCO's vertical maximum price-fixing conspiracy diminished interbrand competition and that USA's losses, which flow directly from that restraint, constitute antitrust injury.

The Ninth Circuit properly declined to follow a disturbing trend among lower courts to use antitrust injury to overrule *sub silentio* the substantive provisions of antitrust laws. Nothing in *Brunswick* suggests that an anticompetitive scheme, particularly one that is per se unlawful, can be transformed into procompetitive behavior under the guise of antitrust injury. ARCO's attempt to treat unlawful price-fixing as though it were single firm price competition when applying the antitrust injury requirement is particularly egregious because it flatly contradicts the express language of the Sherman Act and

this Court's precedents that subject concerted activity to stricter scrutiny than unilateral behavior. The Ninth Circuit's reversal of the district court's dismissal of USA's § 1 claim was appropriate and should be affirmed.

ARGUMENT

I. USA CAN SHOW ANTITRUST INJURY FROM A VERTICAL CONSPIRACY TO FIX BELOW-MARKET PRICES.

ARCO's argument that USA has not suffered antitrust injury is predicated on the characterization of its vertical maximum price-fixing scheme as having "increased competition." (Brief of Petitioner at 10.) The Ninth Circuit properly rejected ARCO's contention as "contrary to the antitrust laws." *USA*, 859 F.2d at 696. This Court's recent opinions expressly recognize the negative interbrand effects of vertical price-fixing conspiracies.

A. The Ninth Circuit Correctly Held that a Plaintiff Suffers Antitrust Injury When Its Losses Reflect the Presumed Anticompetitive Effects of the Per Se Offense.

The antitrust injury requirement of Clayton Act § 4 limits plaintiffs' recoveries to losses that flow from harm to competition. 15 U.S.C. § 15; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). To determine whether the plaintiff has suffered antitrust injury, courts

examine whether the plaintiff's individual loss flows from the restraint's injury to the competitive process.

In this case, § 1 governs whether and in what ways ARCO's vertical maximum price-fixing conspiracy unreasonably restrained the competitive process in the interbrand market.[10] *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). In most cases, this requires an examination of all the particular circumstances of a restraint – including characteristics of the industry, the history of the restraint and the reasons why it was imposed – to determine whether its anticompetitive effects outweigh any procompetitive benefits. *Id.*; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 & n.15 (1977). Certain pernicious conduct, however, falls within the per se category. Conduct such as vertical price-fixing is "manifestly anticompetitive" and conclusively presumed to restrain trade unreasonably without elaborate market analysis. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 1519 (1988).

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[10] The DOJ/FTC relies on Clayton Act § 7 cases to argue that the substantive offense does not necessarily define actionable, anticompetitive conduct. (Brief of DOJ/FTC at 13-14.) The incipiency statutes such as § 7 prohibit conduct whose effect "may be substantially to lessen competition." *See* 15 U.S.C. § 18. Thus, unlike § 1, a violation does not establish actual harm to competition. *Brunswick*, 429 U.S. at 485-86; *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).

To satisfy the antitrust injury requirement, a plaintiff in a § 1 case must show that its losses reflect "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick*, 429 U.S. at 489; *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 13 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980). The injury analysis is substantially the same for per se and rule of reason offenses. In per se cases such as this one, the harm to competition is presumed and need not be proven. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-85 & nn. 7-8 (1986); *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2831 (1988).

In the oft-quoted passage from *Brunswick*, a plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489 (emphasis in original). This inquiry is precisely what the Ninth Circuit undertook. As a preliminary matter, the court examined the anticompetitive effects presumed to flow from vertical maximum price-fixing. *USA*, 859 F.2d at 690-93. The unifying rationale for the Sherman Act's per se condemnation of price-fixing is that price, the "central nervous system" of free enterprise, must be determined by the free market forces of supply and demand alone. *Id.* at 690-92; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 223, 225-26 n.59 (1940). Price-fixing of any kind directly interferes with the competitive process that the Sherman Act was intended to protect:

> Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interests of consumers have been a recurrent concern because consumers have been perceived as victims of the

> abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.
>
> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a by-product, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.

Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1153-54 (1981) (footnotes omitted).

This paradigm governs vertical maximum price-fixing cases. One evil of these schemes is that they "substitute the perhaps erroneous judgment of a seller for the forces of the competitive market."[11] *Albrecht v. Herald Co.*,

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[11] [Vertical maximum price-fixing] is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing – a denial of rights guaranteed by the goals of antitrust policy. Congress

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390 U.S. 145, 152-53 (1968). Vertical maximum price-fixing interferes with a competitor's right to compete in a free market. *USA*, 859 F.2d at 693; *cf. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir. 1989); *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55, 67-68 (2d Cir. 1988). It is no defense that consumers do not, in the short term, suffer immediate injury. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-38 (7th Cir. 1986). The rule against price-fixing was meant to protect sellers as well as consumers. *USA*, 859 F.2d at 693. "A healthy and unimpaired competitive process is presumed to be in the consumer interest." *Fishman*, 807 F.2d at 536.

The Ninth Circuit then juxtaposed USA's injury with the breakdown of competitive conditions presumed to flow from the vertical price-fixing – substitution of ARCO's judgment for the impersonal market forces of supply and demand. In finding antitrust injury, the court held that "the success of some firms and the failure of other firms, when due to illegal pricing practices, must be characterized as a 'lessen[ing] [of] competition.'" *USA*, 859 F.2d at 696. USA's lost profits from having to compete

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did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1149 (1987).

with fixed, below-market prices were, in the language of *Brunswick*, "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (Sherman Act protects "against the loss of profits from practices forbidden by the antitrust laws").

In addition, the Ninth Circuit held that the per se rule encompassed long-term, as well as short-term, effects. *USA*, 859 F.2d at 694 (citing *Sharp*, 108 S. Ct. at 1519-20). Taking USA's allegations of the offense, which were conceded by ARCO as true, the court found that USA's injury was necessary to the accomplishment of ARCO's long-term anticompetitive strategy. "[W]hen firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced services to consumers." *Id.* at 696. Consequently, USA's losses reflected the anticompetitive purpose and effects of per se price-fixing conspiracy.[12] *Id.* at 693-94, 696.

The Ninth Circuit rejected ARCO's invitation to find that *Brunswick sub silentio* overruled the substantive case authorities governing vertical maximum price-fixing under § 1. *USA*, 859 F.2d at 694 n.5. In doing so, the court departed from two recent Seventh Circuit opinions that

[12] ARCO appears to concede that if the per se rule presumes an unreasonable restraint on interbrand competition, USA has suffered antitrust injury. (Brief of Petitioner at 20; Pet. at 14.) Similarly, the Ninth Circuit found this part of the inquiry straightforward. *USA*, 859 F.2d at 693.

openly used antitrust injury to review *de novo* the legality of maximum resale price maintenance. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1420 (7th Cir. 1989); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). In *Jack Walters*, Judge Posner stated his view that such price-fixing should not be per se unlawful. 737 F.2d at 706-07. Recognizing, however, that this Court held to the contrary, he retreated to antitrust injury, concluding that a dealer "would not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage." *Id.* at 708-09; *Indiana Grocery*, 864 F.2d at 1418 (applying *Jack Walters* to an interbrand competitor).

The Ninth Circuit is not alone in its rejection of the *Jack Walters* view of antitrust injury. Its opponents include other panels within the Seventh Circuit. *See Fishman*, 807 F.2d at 533. A commentator often sympathetic to the Chicago School criticized the Seventh Circuit's misuse of antitrust injury to overturn controlling statutes and Supreme Court precedent:

> I cannot escape the conclusion that Judge Posner – growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht* – has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. . . . But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1026 (footnote omitted).

B. The Per Se Rule Presumes that Vertical Price-Fixing Has Adverse Effects on Interbrand Competition.

The basic premise of ARCO's entire injury argument is that vertical maximum price-fixing, without more, does not injure the interbrand market. It cites the dealer-initiated vertical maximum price-fixing cases that previously reached this Court. *Albrecht*, 390 U.S. at 145; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). (*See* Brief of Petitioner at 27-28, 31-32; Brief of DOJ/FTC at 18-20.) ARCO argues that because those cases focus only on effects in the intrabrand market, this Court has implicitly rejected the possibility that vertical conspiracies have adverse interbrand effects. Nothing could be further from the truth.

In *Sharp*, decided only last year, this Court explicitly recognized that "vertical price restraints reduce *inter*brand price competition because they 'facilitate cartelizing.' " 108 S. Ct. at 1520 (quoting *Sylvania*, 433 U.S. at 51 n.18). The adverse effects on interbrand competition, "the primary concern of the antitrust laws," are precisely what warranted this Court's per se treatment of vertical price-fixing. *Id.* at 1521; *Sylvania*, 433 U.S. at 52 n.1 .

Whenever there is vertical price-fixing, regardless of the level of fixed prices, marketplace decisionmaking is

left in the hands of a few suppliers instead of the suppliers and numerous independent retailers. This smaller number of competitors reduces sharply the difficulties of coordinating and enforcing a horizontal cartel.[13] Posner, *Oligopoly and the Antitrust Laws*, 21 Stan. L. Rev. 1562, 1571 (1969); Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare*, 28 Stan. L. Rev. 903, 905 (1976); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). Thus, vertical price-fixing can facilitate cartelization without any one producer having or threatening to achieve monopoly power.[14]

By facilitating horizontal collusion, vertical maximum price-fixing may ultimately result in supracompetitive prices.[15] *Cf. Arizona v. Maricopa County Medical*

[13] This Court did not distinguish between maximum and minimum price-fixing in describing the "cartel facilitating" effects of vertical conspiracies. *Sharp*, 108 S. Ct. at 1520, 1525; *Sylvania*, 433 U.S. at 51 n.18. Even if, however, such a distinction were to be made, it is arguable that maximum price-fixing may be more conducive to horizontal collusion. As this Court has recognized, there will be little or no incentive to cheat when prices are already below the level at which conspirators could sell their goods. *Matsushita*, 475 U.S. at 596 n.20.

[14] Vertical price-fixing generally occurs in imperfect markets. Flynn & Ponsoldt, *supra* note 11, at 1149; *see Socony*, 310 U.S. at 224-25 n. 59 (price-fixing has utility even where conspirators do not threaten monopoly power).

[15] High entry barriers make it unlikely that new entrants would destabilize the cartel. The lack of entry by new independent marketers, even in the face of higher gasoline retail prices evidences these barriers. (J.A. 15, 20.)

Society, 457 U.S. 332, 348 (1982) (maximum price-fixing may facilitate future agreement on uniform prices); *Albrecht*, 390 U.S. at 153 (vertical maximum price-fixing may acquire attributes of minimum price-fixing); *USA*, 859 F.2d at 696 ("when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers"). "[I]ndustry wide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987).

The facts of this case corroborate this Court's observations that vertical price-fixing has detrimental interbrand effects. ARCO conspired with its dealers to fix below-market prices in order to eliminate the independent, low-price competitors such as USA. (J.A. 14-20.) After absorbing the independents' market share, ARCO could stabilize retail margins in the concentrated market at higher levels.[16] *USA*, 859 F.2d at 696; *see* R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes and Other Materials* 336 (1981) (absence of a fringe of small sellers is conducive to collusion); R. Posner, *Antitrust Law: An Economic Perspective* 56 (1976) (same).

This Court has previously held that a manufacturer's vertical conspiracy to eliminate intrabrand discounters is unlawful per se. *United States v. Parke, Davis & Co.*, 362

[16] The long history of price coordination among the major integrated oil companies increases the probability of collusive behavior. (J.A. 13.) R. Posner, *supra*, at 61.

U.S. 29, 45-47 (1960); *see also United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966). ARCO's scheme has even greater anticompetitive effects because it is designed to eviscerate interbrand price competition, the primary concern of the antitrust laws.[17]

C. The Alternative to a Per Se Presumption of Injury to Interbrand Competition Is the Rule of Reason.

Even if we adopt ARCO's predicate that the per se rule presumes an unreasonable restraint only on intrabrand, not interbrand, competition, it does not follow that USA must demonstrate injury flowing from a violation of § 2. If USA is not entitled to a presumption of

[17] As such, ARCO's scheme is also far more pernicious than that in *Albrecht*, on which ARCO relies. (Brief of Petitioner at 25-26.) It is argued that a manufacturer should be able to fix price ceilings if it grants retailers exclusive territories that enable them to charge supracompetitive prices. *See Albrecht*, 390 U.S. at 159 (Harlan, J., dissenting); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 171-72 (7th Cir. 1988); *Jack Walters*, 737 F.2d at 706-07; Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981); Amicus Brief of American Newspaper Publishers Association. However, consumers who respond by switching to other brands are sending the manufacturer an economic signal that its exclusive territory system is undesirable. The apologists for vertical price-fixing err in seeking to insulate the manufacturer from such manifestations of consumer choice. "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law." *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 107 (1984) (footnote omitted). As gasoline is not sold at retail through exclusive territories, this debate need not be addressed here.

anticompetitive effect, it may still prove injury by demonstrating actual, adverse interbrand effects from ARCO's conspiracy using a rule of reason analysis. Conspicuously absent from ARCO's brief is reference to USA's factual allegations, which describe the particular injury done to the interbrand gasoline market in this case. ARCO's attempt to misuse antitrust injury to evade the substantive law of § 1, therefore, must be rejected. Under either standard, the Ninth Circuit's ruling is correct.

The general standard of liability for § 1 offenses is the rule of reason, which differs from the per se rule only in its requirement that the plaintiff prove, and not simply presume, anticompetitive effect. *Sharp*, 108 S. Ct. at 1519. The essential inquiry remains the same – whether the challenged restraint is unreasonable.[18] *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984); *Engineers*, 435 U.S. at 692. Thus, the analysis of a plaintiff's antitrust injury is identical to that under the per se rule. *Cf. Newman*, 813 F.2d at 1522-23.

USA's allegations that ARCO's conspiracy facilitated cartelization in the interbrand gasoline market state a § 1 violation under the rule of reason. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 441 n.16 (1978) (conduct facilitating horizontal price stabilization);

[18] Where the plaintiff proves a naked restriction on price or output, the burden shifts to the defendant to demonstrate a countervailing competitive justification. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). Otherwise, the plaintiff may rely either on proof of actual detrimental effects on supply, demand, or price, or on market power analysis. *Id.*

United States v. Container Corp., 393 U.S. 333, 336-37 (1969). Whether ARCO's vertical maximum price-fixing conspiracy was felt in the interbrand market, through elimination of the industry's sole significant source of price competition and facilitation of collusion in an already concentrated market is a question of fact. *HCA*, 807 F.2d at 1386. Relevant factors to be considered include the degree of reduction in the number of competitors and the resulting increase in concentration, the level of price before and after the conspiracy, the history of collusion in the industry, and barriers to entry, particularly of independents, after the conspiracy.[19] *Id.* at 1387-89; R. Posner & F. Easterbrook, *supra* p. 19, at 336-40; R. Posner, *supra* p. 19, at 55-71.

USA may prevail under the rule of reason if it proves the allegations in its complaint. ARCO deliberately targeted its below-market price-fixing conspiracy at independent gasoline stations, which were making inroads into the gasoline market through aggressive price competition. (J.A. 14-20.) It successfully eliminated this segment of the industry, leaving the other major integrated oil companies untouched. (J.A. 16-17.) As USA alleged in its complaint, the disappearance of the independents created a more concentrated industry, facilitated a general rise in prices and stabilized retail margins. (J.A. 20.) Because

[19] The DOJ/FTC incorrectly dismisses the Ninth Circuit's concern about anticompetitive harm by saying, "We believe that the observation has no relevance to a case in which the defendant never attained more than 17% of the relevant market." (Brief of DOJ/FTC at 14 n.9.) Absent analysis of the market structure, the DOJ/FTC's belief is pure conjecture without factual foundation.

barriers to entry for independents are high, it is unlikely that new entrants will bid down these supracompetitive prices. (J.A. 15.)

Thus, even if injury to interbrand competition is not presumed, the Ninth Circuit's reversal of the district court's grant of summary judgment and its remand to the district court for a factual adjudication of the marketplace effects of ARCO's conspiracy should be affirmed.

II. ARCO'S SUPERIMPOSITION OF § 2 ELEMENTS ON VERTICAL MAXIMUM PRICE-FIXING IN ITS ANTITRUST INJURY ANALYSIS IS IMPERMISSIBLE

ARCO eschews § 1 analysis and argues instead that its price-fixing should be judged by the same standard governing single firm pricing under § 2. Recognizing that its proposal directly contradicts the Sherman Act's statutory scheme, ARCO frames its argument in antitrust injury terms. The antitrust injury requirement is not intended, however, to permit defendants to rewrite the substantive law.

A. Vertical Maximum Price-Fixing Is Not the Legal or Economic Equivalent of Single Firm Pricing and Cannot Be Subject to § 2 Standards.

ARCO's defense that its vertical conspiracy cannot cause interbrand effects absent a dangerous probability of successfully monopolization and predatory pricing rests on the presumption that vertical price-fixing is the legal

and economic equivalent of a single firm's decision to price its product below prevailing market prices.[20]

This Court's recent opinions have consistently held that the Sherman Act contains a basic distinction between concerted activity and unilateral conduct.

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression . . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. . . .
>
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities . . . . Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. . . . Whatever form [per se or rule of reason] the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior

[20] ARCO misrepresents that USA claims damages from pricing at ARCO's company-owned stations. (Brief of Petitioner at 4 n.2, 34 n.17.) The interrogatory answer to which ARCO refers was drafted in August 1985 before USA dropped its § 2 claim against ARCO. That response made clear that USA had not completed its damage study and identified for ARCO's information only the USA and ARCO stations in closest geographic proximity to each other. (J.A. 55-56.)

> is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69 (1984) (citations and footnotes omitted, emphasis in original). ARCO's threatened monopolization element and the DOJ/FTC's predatory pricing standard ignore this bright line drawn by the Court.[21]

This Court has for decades held that price-fixing is to be treated with far greater hostility than single firm pricing. Price-fixing violates § 1 even though a single firm's decision to price at the same level would escape liability. *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986); *USA*, 859 F.2d at 694 n.6. Specifically, this Court expressly declined to apply the § 2 predatory pricing standard to below-market

[21] ARCO's defense below was based only on the threatened monopolization element and not on the level of its fixed prices. (J.A. 74-75; Dckt NR 83, Exh. 1 at 39 n.*) Consequently, the district court made no findings, and Arco presented no evidence, as to the level of fixed prices, their relationship to cost, ARCO's anticompetitive intent, or recoupment of losses. The DOJ/FTC proposes an undefined "predatory pricing" standard to be determined on remand.

price-fixing under § 1. *Matsushita*, 475 U.S. at 584-85 n.8. After noting the conflicting views of the § 2 offense, this Court held:

> We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure or cost.

Id.; *Cargill*, 479 U.S. at 117-18 n.12. The DOJ/FTC's statement that this Court adopted a § 2 predatory pricing standard in *Matsushita* is therefore false.[22] (Brief of DOJ/FTC at 15; *see also* Brief of Petitioner at 42.)

Reasonableness of fixed prices is not, and has never been, a cognizable defense.[23] Otherwise, "the Sherman

[22] This Court defined its use of the term "predatory" in footnote 8, which is set forth, in pertinent part, above. Elsewhere, this Court described the conspiracy as one "to charge below market prices." *Matsushita*, 475 U.S. at 596. On remand, the Third Circuit affirmed summary judgment based on its reading of this Court's decision as addressing plaintiff's claim of below-market pricing. *In re Japanese Electronic Products Antitrust Litigation*, 807 F.2d 44, 47-48 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).

[23] Similarly, it is no defense that they might have been able to cause the same loss through means other than conspiracy. *Kiefer-Stewart*, 340 U.S. at 214; *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir. 1979); *Engine Specialties*, 605 F.2d at 14-15. ARCO's argument would effectively preclude recoveries from § 1 offense, including horizontal price-fixing, on the theory that competitors could have independently and lawfully set identical prices.

Act would soon be emasculated; its philosophy supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." *Socony*, 310 U.S. at 221-22; *see also Arizona*, 457 U.S. at 345; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). "The per se rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' " *Arizona*, 457 U.S. at 348 (quoting Rahl, *Competition and the Price Fixing Rule*, 57 Nw. U.L. Rev. 137, 142 (1962)).

ARCO and the DOJ/FTC's contention that "[r]educed, but nonpredatory, [fixed] prices have the same effect on a competitor as the price competition that the antitrust laws are designed to foster" is also incorrect as a factual matter. (*See* Brief of DOJ/FTC at 8, 13-14; Brief of Petitioner at 25, 33-34.) Vertical maximum price-fixing, in many respects, is a far more rational (and, therefore, more likely) strategy for the elimination of horizontal competitors than is unilateral predatory pricing. As this Court has recognized, predatory pricing is often unattractive because a single firm must be willing to sustain greater losses than the victim without any assurance that it will be able to recoup that investment. *Matsushita*, 475 U.S. at 589, 593 n.17.

Conversely, a supplier that implements a vertical maximum price-fixing conspiracy can share its losses with its downstream co-conspirators. ARCO fails to mention that its offering of price allowances was only part of the conspiracy. (Brief of Petitioner at 33.) By raising station rents by three or four hundred percent and increasing its percentage revenue from non-gasoline sales made by the dealers, ARCO forced its dealers to absorb some of

the lost revenues necessitated by below-market price-fixing.[24] While ARCO and the dealer shared the loss, nonintegrated independents such as USA had to bear the full loss imposed by ARCO's below-market price-fixing. These independents could not compete with ARCO's vertical conspiracy, at least without the benefit of a similar price-fixing conspiracy with a supplier.[25] When the cost to the defendant of engaging in a particular exclusionary method is less than or equal to the cost imposed on the victim, anticompetitive conduct is far more likely to

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[24] Thus, vertical maximum price-fixing is much easier to implement successfully than horizontal maximum price-fixing among competitors. In a horizontal conspiracy, rivals must allocate losses and future gains. *Matsushita*, 475 U. S. at 590. Thus, "[s]uch a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator." *Id.* In contrast, because the supplier has control of its dealers and the ability to coerce them, it unilaterally determines and enforces the allocation of loss. Flynn & Ponsoldt, *supra* note 11, at 1149 n.91.

[25] ARCO and the DOJ/FTC confuse antitrust injury with the measure of a plaintiff's damages. USA does not rely "simply on the theory that different prices might have prevailed in the absence of an antitrust violation." (Brief of DOJ/FTC at 14.) Rather, USA contends that the conspiracy fixed a price that could not have been obtained otherwise. Moreover, whether dealers could and would have charged the identical price even absent the conspiracy is a question of fact that USA must take into account in computing its damages. *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985). While the exact apportionment of loss between ARCO and its dealers cannot be determined without further discovery, it seems likely, given the increased financial burdens, that dealers would not have unilaterally lowered prices to the level fixed by ARCO.

occur. *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 & n.2 (D.C. Cir.) (Bork, J.), *cert. denied*, 479 U.S. 851 (1986). Moreover, because vertical price-fixing tends to facilitate collusion and create a market structure in which sellers may charge supracompetitive prices, the conspirator has a greater probability of recouping its losses. *See supra* pp. 17-20.[26]

Contrary to the DOJ/FTC's characterization, an independent in this scenario does not succeed or fail on the basis of efficiency. (Brief of DOJ/FTC at 20.) As this Court held in a different context: "So long as the price cutter does not receive a price 'break' from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear . . . to deprive the otherwise resourceful retailer of the very fruits of his efficiency and convert the normal competitive struggle between retailers into an

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[26] ARCO now mischaracterizes its motion and the district court's findings as establishing that ARCO's conspiracy "present[ed] no danger of creating a market structure that will permit supracompetitive prices in the future." (Brief of Petitioner at 12; *see id.* at 4, 6, 43.) ARCO's motion below addressed *only* the threatened monopolization element of § 2, which does not encompass noncompetitive oligopoly markets. (Brief of Petitioner at 6 n.4; J.A. at 74-75.) *Indiana Grocery*, 864 F.2d at 1416; *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). Therefore, the district court made no findings regarding the likelihood or existence of post-conspiracy supracompetitive pricing.

unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition." *FTC v. Sun Oil Co.*, 371 U.S. 505, 522 (1963).

Because it assumed that concerted price-fixing and unilateral pricing are identical, ARCO and the DOJ/FTC do not even address USA's argument that the shared-cost and cartel facilitating aspects of vertical maximum price-fixing makes it a much more likely, and therefore more dangerous, strategy for eliminating interbrand competition than single firm predatory pricing. While the DOJ/FTC asserts that, as a matter of law, "only predatory pricing has the requisite anticompetitive effect" (Brief of DOJ/FTC at 12), it does not explain, and none of its cited cases support, that proposition.[27]

B. This Court Should Reject Efforts to Rewrite Substantive Offenses Under the Guise of Antitrust Injury.

The antitrust injury requirement is not license to alter what the antitrust laws define as anticompetitive

[27] As discussed earlier, *Matsushita* refused to equate maximum price-fixing and predatory pricing. 475 U.S. at 584-85 n.8. While the DOJ/FTC relies heavily on *Cargill*, that case addressed only single firm pricing and did not mention price-fixing. 479 U.S. at 114-18, 120-22. This Court did not address, because not raised below, the question of whether a single firm's pricing that created "a trend toward oligopoly pricing" was sufficient to cause antitrust injury under § 7. *Id.* at 114 n.9. The Court suggested that even a single firm with a low market share might nevertheless find a predatory pricing strategy feasible. *Id.* at 119-20 n.15.

behavior. In *Brunswick*, this Court rejected the plaintiff's claimed loss because it "divorce[d] antitrust recovery from the purposes of the antitrust laws." 429 U.S. at 487. ARCO's proposed antitrust injury standard, which denies recovery for anticompetitive conduct, is equally inconsistent with the antitrust laws.

Antitrust injury must, in this case, be linked to the substantive goals of Sherman Act § 1. This Court has expressly declined to engraft additional requirements on the § 4 remedy beyond that required by § 1.[28] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 & n.9 (1982). To establish antitrust injury, the plaintiff must show "the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct." *Id.* at 481. This Court has held that § 4 is to be applied in a way that "would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Id.* at 472.

Contrary to this Court's admonitions, antitrust injury is being used by some lower courts to undermine

[28] Section 1 is distinguishable from the antitrust statutes that condemn conduct that will produce future injury. *Engine Specialties*, 605 F.2d at 13. In the latter category of cases, "respondents must prove more than that petitioner violated [the statute], since such proof establishes only that injury may result." *Brunswick*, 429 U.S. at 486 (Clayton Act § 7); *J.Truett Payne*, 451 U.S. at 562 (Robinson-Patman Act § 2(a)); *Cargill*, 479 U.S. at 107 (Clayton Act § 7).

substantive antitrust goals with which they disagree. For example, this Court affirmed judgment for a distributor terminated for refusing to adhere to a vertical minimum price-fixing scheme. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984). Subsequently, however, the Seventh Circuit ruled that a terminated dealer does not suffer antitrust injury from vertical minimum price-fixing.[29] *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986). It is impossible to reconcile the *Monsanto* and *Local Beauty Supply* decisions.[30] This example illustrates how antitrust injury can, by eliminating private enforcement, permit conceded violations to go unpunished and undeterred.[31] "Even those who stress narrow economic objectives for antitrust law . . . should

[29] The Seventh Circuit in *Local Beauty Supply* arrived at this conclusion by deciding, as matter of law, damage issues that are clearly questions of fact. The court decided that discounters of beauty products cannot exist absent minimum price-fixing and necessarily "free ride" off full service dealers. 787 F.2d at 1202. These propositions, while stated as conclusions of law, depend on the circumstances of a particular case. *See Dolphin Tours*, 773 F.2d at 1511. Economic theory, while useful in evaluating the market impact of a defendant's conduct, cannot substitute for an analysis of the facts. Flynn, *Legal Reasoning, Antitrust Policy and the Social "Science" of Economics*, 33 Antitrust Bull. 713, 741-43 (1988).

[30] Professor Hovenkamp criticizes *Local Beauty Supply* as a "judicial attempt[] to undermine the political process by subordinating it to a particular economic view that has not itself attained sufficient support to be legislated into the antitrust laws." Hovenkamp, *supra* p. 17, at 1022.

[31] As another example, an actor challenged a horizontal conspiracy among motion picture studios to fix the percentage

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be concerned with the potential effects [on the substantive law] of recent antitrust injury interpretations."[32] Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. ___, ___ (forthcoming, Nov. 1989).

An antitrust injury standard that is divorced from the substantive law is wholly unworkable. Absent a consistent benchmark to guide the determination of whether the defendant's conduct injures the competitive process, conflicts among and within the circuits as to the application of antitrust injury will undoubtedly proliferate. Here, for example, ARCO and the Seventh Circuit view vertical maximum price-fixing as desirable, procompetitive conduct that does not cause antitrust injury.[33] *See*

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share of video proceeds paid to actors and retain the bulk of the revenues for themselves. The studios' conspiracy also fixed the rates paid to actors who signed contracts prior to the formation of the conspiracy. The Ninth Circuit held that the actor, the direct recipient of fixed prices for his services, did not suffer antitrust injury. *Newman*, 813 F.2d at 1522-23. This antitrust injury holding undermines the rule against horizontal price-fixing by denying the right of recovery to direct victims.

[32] To this extent, antitrust injury is to the 1980's what interstate commerce was to the 1960's. *See McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Burke v. Ford*, 389 U.S. 320 (1967).

[33] The DOJ/FTC's amicus brief in this case is a thinly veiled effort to circumvent Congress' support of the per se rule against vertical price-fixing. In response to the DOJ's original "amicus intervention program," which culminated in its request that this Court overturn the per se rule, Congress prohibited the use of taxpayer funds on behalf of defendants

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Indiana Grocery, 864 F.2d at 1418 (such price-fixing, "a practice that is itself competitive," does not cause antitrust injury); *USA,* 859 F.2d at 702 (Alarcon, J., dissenting) ("If [vertical maximum price-fixing] is not anticompetitive,it follows that no antitrust injury exists."). The Ninth Circuit disagrees, viewing such price-fixing as destructive of competition.

The Ninth Circuit correctly rejected ARCO's interpretation of antitrust injury. It held that *Brunswick* required it to "look closely at the purposes and policies underlying the antitrust laws, and . . . determine which application of the doctrine of 'antitrust injury' best implements those purposes and policies." *USA,* 859 F.2d at 689. To the extent that there are concerns about whether particular conduct is pro- or anticompetitive, those issues should be fully addressed by the substantive law.[34] *Id.* at

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charged with vertical price-fixing. *See Vertical Restraints Guidelines Resolution,* H.R. Rep. No. 99-399, 99th Cong., 1st Sess. 4 (1985). After assuring Congress that it would comply, the DOJ promulgated its Vertical Restraints Guidelines, which were criticized as a "bold attempt to circumvent the Congress." *Id.* at 8. Congress promptly asked the Attorney General to recall the Guidelines. *Id.* at 1; Pub. L. No. 99-180, 99 Stat. 1136, 1169-70 (1985).

[34] In fact, this Court has molded the substantive law to address the concerns raised by ARCO and the DOJ/FTC. In *Monsanto,* this Court articulated an evidentiary standard for proof of conspiracy that ensures that procompetitive, unilateral price competition is not deterred. 465 U.S. at 762-64; *Sharp,* 108 S. Ct. at 1520. (*See* Brief of Petitioner at 45 n.29.) In *Sharp,* this Court required proof of an agreement on price or price levels so as not to deter beneficial nonprice restraints. 108 S. Ct. at 1517, 1525. (*See* Brief of DOJ/FTC at 9.)

696. If, after a substantive analysis, this Court decides that vertical maximum price-fixing benefits competition, then it is the substantive offense, and not the injury standard, that should be revised.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's reversal of the district court's grant of partial judgment should be affirmed and the case remanded.

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Respectfully submitted,

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